

COMMONWEALTH OF KENTUCKY  
BEFORE THE PUBLIC SERVICE COMMISSION

In the Matter of:

PETITION BY MCI FOR ARBITRATION OF	)	
CERTAIN TERMS AND CONDITIONS OF A	)	
PROPOSED AGREEMENT WITH BELL SOUTH	)	CASE NO. 96-431
TELECOMMUNICATIONS INC. CONCERNING	)	
INTERCONNECTION AND RESALE UNDER	)	
THE TELECOMMUNICATIONS ACT OF 1996	)	

O R D E R

On December 20, 1996, the Commission entered its final Order deciding the arbitrated interconnection issues between MCI Telecommunications Corporation and MCImetro Access Transmission Services, Inc. ("MCI") and BellSouth Telecommunications Inc. ("BellSouth"). BellSouth and MCI have requested reconsideration and clarification of certain issues contained in that Order. The Commission's decisions regarding the parties' requests follow.

I. RECONSTITUTION OF UNBUNDLED NETWORK ELEMENTS

BellSouth requests rehearing on the issue of recombination of unbundled network elements, citing it as "one of the most critical matters to be arbitrated."<sup>1</sup> BellSouth states that the Commission's Order permits MCI to circumvent the pricing policy set forth by the Act for the resale of retail services and to avoid the joint marketing restricting of Section 271(e)(1) of the Act. BellSouth states that the Order imposes a "grave injustice" on it,<sup>2</sup> and argues that, since rebundling elements to provide a service is only resale by another

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<sup>1</sup> BellSouth Petition at 1.

<sup>2</sup> BellSouth Petition at 2.

name, the resale pricing standards of Section 252(d)(3) of the Act, rather than the unbundled element pricing standards of Section 252(d)(1) of the Act, must apply. BellSouth argues that this result is compelled because Congress must have intended that competitors could provide retail service through combination of elements bought at unbundled elements rates only if they combine these elements with their own facilities.<sup>3</sup> Allowing a competitor to buy at unbundled rates and then combine the elements to provide service produces price "arbitrage," a result BellSouth claims Congress could not have intended.<sup>4</sup>

The Commission agrees that the issue is critical. If competitors are not able to use BellSouth's network elements at cost to provide service, viable competition is unlikely to grow. Moreover, the Commission rejects BellSouth's strained legal argument, which would require it to ignore the language and the structure of the statute.

The pricing for resale and the pricing for unbundled elements appear in two entirely different sections of the Act. Their terms cannot be cobbled together as BellSouth suggests. Section 252(d)(3) sets resale pricing standards "[f]or the purposes of section 251(c)(4)," the subsection which describes an incumbent LEC's duty to offer services for resale. The pricing standards of 252(d)(3) thus apply specifically to resale alone, and not to the sale of unbundled elements pursuant to an entirely different subsection, 251(c)(3).

Section 252(d)(1), in contrast, provides standards for pricing network elements "for purposes of subsection (c)(3)," the subsection which describes an incumbent LEC's ("ILEC") duty to sell unbundled elements. Unbundled elements must be sold at a price

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<sup>3</sup> BellSouth Petition at 7.

<sup>4</sup> BellSouth Petition at 8.

that is "based on the cost (determined without reference to a rate-of-return or other rate-based proceeding) of providing . . . the network element," that is "nondiscriminatory," and that "may include a reasonable profit." Section 252(d)(1).

Section 251(c)(3) states that an incumbent LEC "shall" provide requesting carriers with "nondiscriminatory access to network elements on an unbundled basis" in accordance with, inter alia, the "requirements of . . . section 252." Furthermore, these elements must not only be provided at the cost plus formula prescribed in Section 252(d)(1); they must be provided "in such a manner that allows requesting carriers to provide such elements in order to provide such telecommunications service." Section 251(c)(3). The statute is plain on its face. The Commission must decline BellSouth's implied invitation to add the words "with their own facilities" after the final use of the word "elements" in the last sentence of Section 251(c)(3). The Commission also declines to adopt BellSouth's strained reading of the statute in which broad implications are garnered from BellSouth's interpretation of what Congress must have "intended." When a statute is plain on its face, its language is conclusive. See, e.g., Lynch v. Commonwealth, Ky., 902 S.W.2d 813, 814 (1995). See also Lincoln County Fiscal Court v. Dept. of Public Advocacy, Ky., 794 S.W.2d 162, 163 (1990) (where statute's words are "clear and unambiguous and express the legislative intent, there is no room for construction or interpretation and the statute must be given its effect as written").

Finally, BellSouth's insistence that the Commission's Order subjects it to injustice is apparently based upon the false premise that it will be unable to compete when its tariffed rate is substantially higher than the price at which a competitor can buy

unbundled elements to provide service. There are alternatives available to BellSouth other than attempting to convince this Commission to distort the statute. It may file an application to restructure its rates so that they more accurately reflect the cost of providing service. As with all issues brought before the Commission, such an application would be reviewed in the interest of providing Kentucky ratepayers affordable and reasonable prices.

Congress's intent is to drive telecommunications rates toward costs and to remove implicit subsidies from those rates. The Commission's Order in this case will, consistently with the federal mandate, help to accomplish these aims. To the extent subsidies are necessary, Congress enacted Section 254 of the Act, which provides for "explicit" universal service support. The Commission's current universal service proceeding, Administrative Case No. 360,<sup>5</sup> is the appropriate docket to consider such issues as subsidization of residential service.

BellSouth has previously taken prudent steps, such as filing for price cap rather than rate of return regulation, to position itself for the advent of local exchange competition. Altering its rates so that they more accurately reflect cost will be another such step, and will eliminate the extreme difference between the current resale rate and the unbundled element rate.

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<sup>5</sup> Administrative Case No. 360, Inquiry Into Universal Service and Funding Issues.

## II. RESTRICTIONS ON SERVICES OFFERED FOR RESALE

### Grandfathered Services

MCI requests clarification of the Commission's decision on grandfathered services. MCI's concern is that BellSouth is opposed to making grandfathered services available to any customers of new entrants, whether they are grandfathered customers of BellSouth currently receiving the service or new customers.<sup>6</sup> MCI is also concerned that the scope of the "limitations" referred to in the Order is unclear.

Grandfathered services are those which are no longer offered to new subscribers, but are continued to be offered to subscribers having the service at the time that it is withdrawn. To deny a subscriber who might consider changing carriers the opportunity to continue to receive the service would put the potential competitor at a competitive disadvantage relative to the ILEC.

BellSouth in its Best and Final offer agreed to resell all of its retail services with certain limitations. One of the services to be resold subject to limitations was grandfathered services. That limitation was that grandfathered services would not be available to new or additional customers. The FCC's order at paragraph 968 states that all grandfathered customers should have the right to purchase such grandfathered services directly from the incumbent or indirectly through a reseller.

The Commission's December 20, 1996 Order is clarified to state that a subscriber changing carriers from the ILEC to a reseller shall be entitled to receive that same

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<sup>6</sup> MCI Petition at 7.

grandfathered service from a reseller who buys the service at the wholesale rate for the duration of the grandfathering period.

#### Promotions

MCI asked the Commission to clarify its Order that promotions lasting 90 days or less be made available for resale but that BellSouth need not provide these to MCI at any additional discount beyond the promotional rate itself. Promotional incentives take many forms. In some cases monthly charges are reduced or waived. In other cases nonrecurring charges such as installation may be waived. These types of incentives are common. MCI, under the Act, can resell any LEC tariffed service at the tariffed price less the wholesale discount and provide any promotional incentive it may consider necessary to meet a LEC's offering.

The Commission therefore clarifies its previous Order to state that services covered by a LEC's promotional offering are subject to the wholesale discount. However, the incentives are not. MCI or any other competing local exchange carrier ("CLEC") is free to package services with its own promotional incentive in any way it sees fit to respond to a similar promotional offering of a LEC.

#### Mandated Discounts

MCI requests that the Commission define and limit this category of services that BellSouth need not provide MCI for resale at any price. The Commission is not aware of any specific discount that BellSouth is mandated to offer. Should any such service arise in the future BellSouth should not be obliged to defer the mandated discounted

service at the mandated discount rate less any wholesale discount. The underlying services are available at the tariffed rates less the wholesale discount rate.

MCI may petition the Commission on a case-by-case basis challenging any restriction as to the terms or limitations contained in BellSouth's tariff.

#### Tariff Terms and Conditions

In its December 20, 1996 Order the Commission stated that services available for resale would be subject to the terms and conditions, including restrictions, found in BellSouth's General Subscriber Tariff. MCI requests modification of this policy to allow the company to challenge these terms, conditions and limitations before the Commission if they are deemed to be anticompetitive.

The Commission agrees with MCI and will modify its policy to allow MCI or any other CLEC to challenge tariffed terms, conditions or limitations before the Commission on a case-by-case basis.

#### Resale Rates

MCI has requested the Commission to establish two discount rates, one for a company providing its own operator services and one for a company purchasing operator services from the ILEC.

The Commission determined in Administrative Case No. 355 that ILECs will not be required to desegregate a retail service into more discrete retail services;<sup>6</sup> therefore this request to unbundle access to operator services from local services is denied.

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<sup>6</sup> Administrative Case No. 355, An Inquiry Into Local Competition, Universal Service, and the Non-Traffic Sensitive Access Rate, Order dated September 26, 1996, at 8.

### III. BILLING SYSTEMS AND FORMAT

BellSouth asks the Commission to clarify its decision on the issue of billing systems and format to direct that a carrier access billing ("CAB") format be used for billing recall services and unbundled elements as opposed to using the actual CABs system.

MCI states that it is concerned with the format of the bill, not with the system used to produce the bill.<sup>7</sup> In its Order the Commission agreed with MCI's arguments that a CABs billing format was efficient and technically feasible. However, the Commission in its conclusion inadvertently omitted the word "formatted." Therefore, the Commission clarifies the decision to reflect that the bills rendered MCI will be in CABs format and that CABs software or hardware systems need not necessarily be used to produce the bill.

### IV. UNUSED TRANSMISSION MEDIA

BellSouth argues in its petition for rehearing that unused transmission media ("dark or dry fiber") is neither a network element nor a retail telecommunications service and that it should not, therefore, be required to make this resource available to competitors. However, the Commission has not defined dry fiber based on either of these definitions. The Commission has defined dry fiber as a resource to the public switched network, in the same manner as access to poles, ducts, conduits, and rights-of-way. Dry fiber constitutes an access point to the public switched network in the same way as a pole, duct, conduit or right-of-way. The latter access points are neither a

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<sup>7</sup> MCI's post hearing brief at 42.



network element nor a telecommunications service available for resale and the Act has made these available to competing companies.

Therefore, the Commission's decision on unused transmission media is affirmed with the following clarification. MCI asked for clarification on its ability to rebut BellSouth's determination that unused transmission media is unavailable. The Commission finds that MCI should be permitted to petition the Commission if it can demonstrate that BellSouth is unwilling to cooperate. The Commission also amends this section of its Order to change the time period for which BellSouth must plan for the utilization of unused transmission media from five (5) years to three (3) years. This shorter time frame conforms to a more reasonable LEC planning cycle and will enable the carrier to review budgeting plans.

#### V. COMPENSATION FOR EXCHANGE OF LOCAL TRAFFIC

BellSouth seeks rehearing of the Commission's determination that the pricing for termination of local calls should be at total element long run incremental cost ("TELRIC") rather than tariff access rates. BellSouth asserts that its appeal of the FCC's order and rules on TELRIC pricing should cause the Commission to reconsider its use of TELRIC in this case, and that the Commission should require true-ups from the implementation of this Order until permanent rates are established after the federal litigation has been concluded. However, independent of any FCC action, the Commission concluded that interconnection should be priced at cost plus a reasonable profit based on Section 252(d)(1) of the Act. Thus, BellSouth's request is denied.

BellSouth also seeks rehearing of the Commission determination to permit bill and keep arrangements for no more than a year. The Commission has reconsidered its decision and will modify the Order to require reciprocal compensation from the outset of this contract, if the two parties do not agree to a bill and keep arrangement. As previously stated by the Commission, "the market will be best served by swift development of the necessary recording and billing arrangements to provide reciprocal compensation among local carriers."<sup>8</sup>

MCI has sought clarification regarding the applicability of interconnection rates set forth in Appendix 1 of the December 20, 1996 Order to compensation for exchange of local traffic. With the modification requiring reciprocal compensation, the rates in Appendix 1 are interconnection rates applicable at the outset of this contract. Should MCI or BellSouth become dissatisfied with the interconnection rates contained in Appendix 1, they may renegotiate rates to become effective upon the termination of this two-year contract.

#### VI. INTERIM LOCAL NUMBER PORTABILITY COST RECOVERY

BellSouth requests the Commission reconsider its decision that each LEC should bear its own cost for providing remote call forwarding as an interim number portability option, arguing that the Commission should instead set a cost-based price for remote call forwarding service. However, the Commission's original decision is consistent with the FCC's determinations and will provide an incentive to the ALECs to implement long term number portability. BellSouth's request is denied.

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<sup>8</sup> December 20, 1996 Order at 14.

## VII. THE PROVISION BY BELL SOUTH OF ADDITIONAL TELRIC STUDIES

BellSouth requests rehearing of the Commission's determination that within 60 days it must provide TELRIC studies for unbundled network elements that do not have a TELRIC estimate listed in BellSouth's best and final offer including the Network Interface Device ("NID") and non-recurring charges. BellSouth asserts that producing such information at this time is unwarranted because of the judicial stay of the FCC's pricing rules. However, the Commission reached its decision without regard to the FCC's stayed pricing standards and instead made independent determinations of the appropriate cost study methodologies for Kentucky. The information requested is necessary to complete the appropriation. Therefore, BellSouth's request is denied.

## VIII. PROCESS FOR ORDERING NETWORK ELEMENTS AND FOR REVIEW OF COST STUDY METHODOLOGIES

MCI has asked for the creation of an expedited process to review orders for additional unbundled network elements. The Commission declines to establish a specific process but notes that should MCI experience any difficulty in ordering additional unbundled network elements, it may file a petition with the Commission. Such a complaint will be handled as expeditiously as possible.

MCI requests that it be given an active role in the review of BellSouth's network element cost studies ordered to be filed. These BellSouth TELRIC studies will be filed in this proceeding in which MCI is clearly a party. Accordingly, the Commission declines to establish a separate proceeding for the review of the TELRIC cost studies.

**IX. ROUTING OF 0+, 0-, 411, 611, AND 555-1212 CALLS**

MCI requests the Commission to clarify its decision concerning the routing of 0+, 0-, 411, 611 and 555-1212 calls. The Commission had decided that it would not require BellSouth to furnish wholesale tariff services minus operator services since BellSouth has no tariffed service without operator services included. Thus, an ILEC will not be required to sever its tariffed services from 0+ and 0- services when an ILEC is reselling the ILEC's tariffed services. However, if an ILEC and a CLEC agree to a wholesale rate for a service without operator services, the Commission will accept such an arrangement. But, if a CLEC provides service through purchase of unbundled elements, then the ILEC shall provide customized routing for 0+, 0-, 411, 611 and 555-1212 calls. The Commission modifies its December 20, 1996 Order to eliminate the statement that BellSouth shall retain 0+, 0-, 411, 611 and 555-1212 calls on an interim basis. If an ILEC asserts that customized call routing is not technically feasible, it has the burden of proving its claim.

**X. PERFORMANCE AND STANDARDS, QUALITY ASSURANCE, AND QUALITY CERTIFICATION**


MCI requests that the Commission require BellSouth to prepare periodic comparative reports on its service quality to enable MCI to determine whether MCI's customers are receiving equal quality of service from BellSouth. However, BellSouth is required to provide the same quality of service to MCI as it provides to itself, and there does not appear to be any reason to assume BellSouth will not in good faith comply with this requirement. Should MCI have a basis on which to allege that a poorer quality of

service is being delivered to its customers than to BellSouth's, then it should immediately bring this matter to the Commission's attention through a petition.

The Commission, having considered the motions for reconsideration and clarification from BellSouth and MCI, and having been otherwise sufficiently advised, HEREBY ORDERS that its December 20, 1996 Order is affirmed in all respects except as modified herein.

Done at Frankfort, Kentucky, this 29th day of January, 1997.

PUBLIC SERVICE COMMISSION

  
Vice Chairman

  
Commissioner

#### DISSENT OF CHAIRMAN LINDA K. BREATHITT

I dissent only from the majority opinion on the issue of recombination of unbundled elements.

Section 251(c)(3) states that an incumbent local exchange carrier shall provide such unbundled network elements in a manner that allows requesting carriers to combine such elements in order to provide such telecommunications service. On its face, this would logically lead to the conclusion that recombination of the unbundled elements in any manner was contemplated by Congress.

However when taken in context with other sections of the Act, this conclusion fails. In particular if recombinations were contemplated, there would have been no reason for Congress to establish two distinct pricing programs - one for resale and one for network

element pricing. The establishment of two pricing arrangements is inconsistent with the idea of recombination of all the elements.

Secondly, the joint marketing prohibition in Section 271(e)(1) states that a telecommunications carrier that serves more than 5 percent of the nation's presubscribed access lines is restricted from jointly marketing its interLATA toll services with services obtained from the BOC via resale. This restriction is lifted when a new entrant purchases unbundled network elements.

It seems to me a loophole in the Act has been exposed. Commissions in Tennessee, Georgia, North Carolina and Louisiana have also recognized this.

The Act requires the elimination of implicit subsidies, which is a good thing in a competitive world. BellSouth's business rates need to come down. However, this Commission has long encouraged telephone price subsidies because they keep urban and especially rural residential rates lower. The Commission affirmed this policy again in Case No. 94-121 by freezing residential rates for a period of three years or until there is a universal service fund in place. The elimination of these subsidies should occur, but my concern is that it may occur too swiftly if competitors are permitted to recombine certain network elements. That leaves residential customers scratching their heads and trying to make sense of competition as their bills increase.

I do not have a crystal ball, nor would I be accomplished in its use if I did have one. I do not know BellSouth's plans on rate rebalancing; nor do I know how all this will ultimately shake out. The Commission has opened a docket on universal service with the intent of providing a safety net where necessary subsidies in rates have been

removed by competitive pricing; but will universal service come to the rescue of rural customers in time? I fear it may not. I respectfully dissent.

  
Linda K. Breathitt  
Chairman

ATTEST:

  
Executive Director